Supreme Court, U. S.
FILED
SEP 20 1976
MICHAEL RODAK, JR., CLERK

No. 75-1443

In the Supreme Court of the United States

OCTOBER TERM, 1976

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

ROBERT H. BORK,
Solicitor General,

REX E. LEE,
Assistant Attorney General,

KEITH A. JONES,
Deputy Solicitor General,

MAURICE ROSENBERG,
Special Assistant to the Attorney General,

ROBERT E. KOPP,
JOHN M. ROGERS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	2
Statement	2
Summary of argument	8
Argument:	
I. The Social Security Act precludes judicial review of the Secretary's refusal to reopen a decision denying a claim for disability benefits	10
A. Section 205(h) of the Act bars federal courts from reviewing decisions of the Secretary save as jurisdiction is granted by Section 205(g) of the Act	10
B. Section 205(g) does not authorize judicial review of the Secretary's decisions on reopening claims	16
II. The Administrative Procedure Act does not confer jurisdiction on the federal courts to review the Secretary's decision	23
Conclusion	41
Appendix	1a

CITATIONS

Cases: Page

Abbott Laboratories v. *Gardner*, 387 U.S. 136 ..... 35, 37, 38
Arnett v. *Kennedy*, 416 U.S. 134 21
Bard v. *Seamans*, 507 F. 2d 765 34
Bramblett v. *Desobry*, 490 F. 2d 405, certiorari denied, 419 U.S. 872 34
Brown v. *General Services Administration*, No. 74-768, decided June 1, 1976 40
Cappadora v. *Celebrezze*, 356 F. 2d 1 ..... 8, 13, 14, 16, 18
Citizens to Preserve Overton Park, Inc. v. *Volpe*, 401 U.S. 402 ..... 35, 37, 38, 39
Davis v. *Richardson*, 460 F. 2d 772 ..... 16, 34
Dunlop v. *Bachowski*, 421 U.S. 560 23
Edelman v. *Jordan*, 415 U.S. 651 37
Elton Orchards, Inc. v. *Brennan*, 508 F. 2d 493 34
Filice v. *Celebrezze*, 319 F. 2d 443 18
Gonzalez v. *Employees Credit Union*, 419 U.S. 90 37
Grant v. *Hogan*, 505 F. 2d 1220 34
Hunt v. *Weinberger*, 527 F. 2d 544 34
Maddox v. *Richardson*, 464 F. 2d 617 16
Mathews v. *Eldridge*, 424 U.S. 319 ..... 9, 20, 21, 22, 41
McEachern v. *United States*, 321 F. 2d 31 34
Neighbors v. *Secretary of Health, Education and Welfare*, 511 F. 2d 80 16
Nguyen da Yen v. *Kissinger*, 528 F. 2d 1194 34
Ortego v. *Weinberger*, 516 F. 2d 1005 ..... 16, 18, 27, 34

Cases—continued Page

Pickus v. *United States Board of Parole*, 507 F. 2d 1107 34
Public Utilities Commission v. *United States*, 355 U.S. 534 22
Rusk v. *Cort*, 369 U.S. 367 ..... 35, 36, 39
Securities and Exchange Commission v. *Louisiana Public Service Commission*, 353 U.S. 368 19-20
Skelly Oil Co. v. *Phillips Petroleum Co.*, 339 U.S. 667 32
South Windsor Convalescent Home, Inc. v. *Mathews*, C.A. 2, No. 75-6136, decided July 27, 1976 ..... 14, 34
Stuckey v. *Weinberger*, 488 F. 2d 904 ..... 10, 11, 16, 27
Twin Cities Chippewa Tribal Council v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 34
Utah Fuel Co. v. *National Bituminous Coal Commission*, 306 U.S. 56 21
Weinberger v. *Salfi*, 422 U.S. 749 ..... 8, 12, 13, 14, 15, 17, 19, 22, 23
Wiley v. *Sinkler*, 179 U.S. 58 36

Constitution, statutes, and regulations:

Administrative Procedure Act, Section 10, 5 U.S.C. 701-706: ..... *passim*
Section 701 ..... 26, 27
Section 701(a)(1) 23, 26, 2a
Section 701(a)(2) 26, 2a
Section 702 ..... 27, 28, 2a
Sections 702-706 27
Section 703 ..... 28, 29, 32, 3a

Constitution, statutes, and regulations—continued — Page

Section 704 — 30, 3a
Section 705 — 31
Section 706 — 31

Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. (Supp. V) 923(b) — 15

Immigration and Nationality Act of 1952, 66 Stat. 163, as amended:

Section 349(a)(10), 8 U.S.C. 1481 (a)(10) — 35
Section 360(b) and (c), 8 U.S.C. 1503(b) and (c) — 35

Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b), 79x — 19-20

Social Security Act, 49 Stat. 620, as amended, 42 U.S.C. 301 *et seq.*:

Section 205, 42 U.S.C. 405 — 2, 10, 11
Section 205(b), 42 U.S.C. (1970 ed.) 405(b) — 3, 18
Section 205(b), 42 U.S.C. (Supp. V) 405(b) — 3
Section 205(g), 42 U.S.C. 405(g) — *passim*, 1a
Section 205(h), 42 U.S.C. 405(h) — *passim*, 2a
Section 216(i), 42 U.S.C. 416(i) — 3
Section 223, 42 U.S.C. 423 — 3
Section 1631(c)(3), 42 U.S.C. (Supp. V) 1383(c)(3) — 15
Section 1872, 42 U.S.C. 1395ii — 15

28 U.S.C. (1946 ed.) 41 — 12, 13, 15, 31

Constitution, statutes and regulations—continued — Page

28 U.S.C. (1946 ed.) 400 — 32
28 U.S.C. 1331 — *passim*
28 U.S.C. 1333 — 24
28 U.S.C. 1337 — 24
28 U.S.C. 2201, 2202 — 31
20 C.F.R. 404.905-404.907 — 3
20 C.F.R. 404.909-404.915 — 3
20 C.F.R. 404.917-404.918 — 3
20 C.F.R. 404.937(a) — 4a
20 C.F.R. 404.945-404.947 — 3
20 C.F.R. 404.951 — 6, 19
20 C.F.R. 404.957(a) — 4, 4a
20 C.F.R. 404.957(b) — 4, 4a
20 C.F.R. 404.957(c) — 4, 5a
20 C.F.R. 404.958 — 4

Miscellaneous:

Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967) — 34
Comment, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers—Jurisdictional Amount, the Administrative Procedure Act and Mandamus*, 51 Wash. L. Rev. 97 (1975) — 35
Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389 (1970) — 29, 34

Miscellaneous—continued Page

3 Davis, *Administrative Law Treatise*, § 23.04 (Supp. 1970) 22
Davis, *Administrative Law Treatise*, § 23.02 (Supp. 1976) 34, 37
Jaffe, *Judicial Control of Administrative Action* (1965) 29, 34
Project, *Federal Administrative Law Developments*—1971, 1972 Duke L.J. 115 ..... 35, 40
S. 800, 94th Cong., 2d Sess. (1976) 31
S. Doc. No. 248, 79th Cong., 2d Sess. (1946) 24, 30, 33, 34
Social Security Administration, *The Year in Review—The Administration of Social Security Programs 1975* (February 1976) 10
Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction:*
§ 2766 (1973) 32
§ 3568 (1975) 28

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1443

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION AND WELFARE, PETITIONER

v.

MISTER SANDERS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1a-10a) is reported at 522 F.2d 1167. The memorandum of the district court (Pet. App. C, pp. 13a-14a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. B, pp. 11a-12a) was entered on September 12, 1975.

A timely petition for rehearing was denied on December 12, 1975 (Pet. App. D, pp. 15a-16a). On March 4, 1976, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including April 10, 1976. The petition for a writ of certiorari was filed on April 9, 1976, and was granted on June 1, 1976. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Social Security Act precludes judicial review of the action of the Secretary of Health, Education, and Welfare in refusing to reopen a decision denying respondent's claim for disability benefits?

2. Whether the Administrative Procedure Act of its own force grants jurisdiction to the federal courts to review the Secretary's action?

STATUTES AND REGULATIONS INVOLVED

Section 205 of the Social Security Act, 49 Stat. 624, as amended, 42 U.S.C. 405, Section 10 of the Administrative Procedure Act, 5 U.S.C. 701-706, and the regulations of the Department of Health, Education, and Welfare are set forth in pertinent part in the Appendix to this brief, *infra*, pp. 1a-5a.

STATEMENT

1. Under Title II of the Social Security Act, 42 U.S.C. 401 *et seq.*, a claimant becomes entitled to disability benefits if he can demonstrate, *inter alia*, (1)

that he is disabled within the meaning of the Act because of a physical or mental impairment, and (2) that his disability arose prior to the expiration of his insured status. 42 U.S.C. 416(i), 423. A claim for disability benefits is initiated by filing an application with the Social Security Administration. 20 C.F.R. 404.905-404.907. If the application is denied initially, the claimant is entitled to reconsideration upon request filed within six months of the date of mailing of notice of the initial determination. 20 C.F.R. 404. 909-404.915. If the claimant is still dissatisfied with the decision after reconsideration, he can obtain an evidentiary hearing before an Administrative Law Judge upon request filed within 60 days of receipt of notice of the reconsidered determination. 42 U.S.C. (Supp. V) 405(b); 20 C.F.R. 404.917-404.918.[1] Within 60 days after the mailing of notice of the Administrative Law Judge's decision, the claimant may seek review from the Appeals Council, which has discretionary powers of review. 20 C.F.R. 404.945-404. 947.

After a hearing and final decision of the Secretary, the claimant within 60 days may commence a civil action in a United States District Court to obtain review of the decision. 42 U.S.C. 405(g).

A determination at each successive stage of the administrative proceedings—initial application, reconsideration, Administrative Law Judge's decision, or

---

[1] Prior to February 29, 1976, the request for a hearing was permitted to be made within six months of the date of mailing of notice of the determination. 42 U.S.C. (1970 ed.) 405(b).

Appeals Council decision—concludes the claim if the claimant fails to carry on to the next stage within the prescribed time limits. However, under the Secretary's regulations a final determination or decision may be reopened within stated time limits, measured from the date of notice of the determination: within 12 months as of right, and within an additional three years "upon a finding of good cause," which is deemed to exist if new and material evidence is furnished or specified types of errors are discovered. 20 C.F.R. 404.957(a) and (b), 404.958. Moreover, a final adverse determination or decision may be reopened "[a]t any time," but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based (and in certain other limited circumstances not relevant to this case). 20 C.F.R. 404.957(c).

2. Respondent, Mister Sanders, instituted this action in the United States District Court for the Northern District of Indiana for review of a decision of the Secretary of Health, Education, and Welfare, denying respondent's second (1973) application for disability benefits (App. 2-3). The complaint predicated the court's jurisdiction on 42 U.S.C. 405(g), a provision of the Social Security Act. In addition to requesting review of the Secretary's decision, the complaint prayed for an order "consistent with the Court's findings" and for attorney's fees and general relief.

a. This case originated on January 30, 1964, when respondent filed an application for a period of disabil-

ity and disability insurance benefits (App. 32). The application asserted that he had been unable to work for four and one-half years because of epilepsy and black-out spells. This claim was denied initially and upon reconsideration (App. 32-33). Respondent requested a hearing and one was held on December 21, 1965 (App. 33). The Administrative Law Judge (then called a Hearing Examiner) considered the question to be whether respondent was "entitled to disability insurance benefits and to the establishment of a period of disability" under the Act (App. 21-22). He observed that the determination of this question was "specifically dependent on whether the claimant was under a disability of the required severity and duration beginning at a time when the earnings requirement was met and continuing through the date of the" decision (App. 22).

In his lengthy decision after the hearing, the Administrative Law Judge made detailed findings, among them that the claimant was born on March 18, 1929, ended his formal education with the fifth grade, and held a succession of jobs, first as a field laborer and later as a service station attendant, construction worker, and mason's helper. After reviewing extensive medical testimony and considering numerous medical reports and records, the Administrative Law Judge found that the respondent (1) last met the special earnings requirements of the Act on June 30, 1962, and (2) had not established under the applicable definitions of disability that he had "im-

pairments, either singularly or in combination, of such severity as to preclude him from engaging in any substantial gainful activity at any time when he met the special earnings requirement of the Act" (App. 25-26). On June 13, 1966, the Appeals Council sustained the decision of the Administrative Law Judge (App. 29-30). The Appeals Council's decision was the final decision of the Secretary with respect to respondent's claim. 20 C.F.R. 404.951. Respondent was notified of his right to judicial review of the decision, but he did not seek review.

b. On March 5, 1973, respondent filed a second application to establish a period of disability and for disability insurance benefits (App. 33). He again alleged epilepsy and black-out spells as the basis of the disability. The second application was denied. Respondent requested reconsideration and was subsequently notified that the denial had been affirmed. He filed a request for hearing on October 3, 1973, and submitted additional evidence that he had complained of epilepsy and black-out spells since 1964 (App. 33).

Since respondent had last met the earnings requirements of the Act on June 30, 1962, to succeed on his 1973 application he would have had to prove the very fact he had failed to establish in connection with his earlier application, *i.e.*, disability commencing no later than that date. Accordingly, the Administrative Law Judge concluded that respondent's new application was barred by *res judicata* (App. 36). On that view of the case, the Administrative Law Judge identified

the issue as "whether the claimant is entitled to have his prior application reopened" (App. 33-34). In refusing to reopen the prior application, the Administrative Law Judge noted that "the additional medical evidence is merely repititions [*sic*] and cumulative" (App. 35) and found that "there is no error on the face of the evidence on which the decision of February 24, 1966 was made" (*ibid.*).

Respondent thereafter sought administrative review of the dismissal of his request for a hearing. On April 5, 1974, the Appeals Council notified respondent that it had affirmed the dismissal and that accordingly the Administrative Law Judge's decision of February 24, 1966, stood as the final decision of the Secretary (App. 37).

c. Respondent then instituted this action for review. By an order dated November 15, 1974, the district court granted the Secretary's motion to dismiss (App. 38). The court held that since the Administrative Law Judge had found that the case was not a proper one for reopening and had denied the claimant's hearing request on the basis of *res judicata*, the district court was without jurisdiction to hear the action (Pet. App. C, pp. 13a-14a). On respondent's appeal, the court of appeals reversed in a 2-1 decision (Pet. App. A, pp. 1a-10a).

The court of appeals agreed with the district judge and the Secretary that jurisdiction to review a refusal to reopen a claim proceeding could not be based upon the Social Security Act (Pet. App. A,

p. 5a). However, the court determined that the Social Security Act did not absolutely preclude review, and it held that the Secretary's denial of reopening was final agency action which the district court had jurisdiction to review under Section 10 of the Administrative Procedure Act, 5 U.S.C. 701-706. The majority took note of a split in authority on the issue, but said it was adopting the view advanced in *Cappadora* v. *Celebrezze*, 356 F. 2d 1 (C.A. 2), and followed in a number of circuits, that the APA contains an independent grant of jurisdiction to review the Secretary's denial of reopening in a disability claim case. The court acknowledged that *Weinberger* v. *Salfi*, 422 U.S. 749, which was handed down after argument of this case, precludes use of the general federal-question statute, 28 U.S.C. 1331, as a basis for jurisdiction to hear Social Security claims, but said that *Salfi* had not considered the APA and hence was "inapposite" here (Pet. App. A, pp. 8a-9a). The dissent rested on the ground that "the simple language of the statute involved forbids judicial review of the decision of the Secretary not to reopen the determination" (Pet. App. A, pp. 9a-10a).

SUMMARY OF ARGUMENT

Federal courts are without jurisdiction to entertain the respondent's suit for judicial review of the Secretary's refusal to reopen a decision made years earlier denying a disability benefits claim. The Social Security Act precludes such a suit because it fails

to satisfy the Act's prerequisites for jurisdiction to review. Both in language and purpose the Act is clear in its design to avoid disrupting the administration of the great volume of Social Security benefit applications, which are ordinarily disposed of by the agency through fair and effective procedures. All courts that have considered the question have agreed that the Act does not confer jurisdiction to review the Secretary's refusal to reopen a claim. That conclusion is entirely consistent with this Court's recent decision in *Mathews* v. *Eldridge*, 424 U.S. 319. That case holds that the Act's prescribed conditions for resort to the courts do not bar suits where, by following the required administrative procedures, the claimant would incur the very injury he sought to obviate.

As for the Administrative Procedure Act as a basis for jurisdiction, there is nothing in its language, history or interpretation by this Court to support the position that of its own force it confers jurisdiction over agency action on the district courts, assuredly not in a case like the present one. The APA's thrust is procedural and remedial, not jurisdictional. It grants broad powers of review to courts that have been otherwise jurisdictionally empowered, but it does not itself accord the power. To hold that it does would risk impairing necessary repose in the administration of Social Security claims, and flooding the courts with great numbers of stale and insubstantial cases.

ARGUMENT

I

THE SOCIAL SECURITY ACT PRECLUDES JUDICIAL REVIEW OF THE SECRETARY'S REFUSAL TO REOPEN A DECISION DENYING A CLAIM FOR DISABILITY BENEFITS

A. Section 205(h) of the Act Bars Federal Courts from Reviewing Decisions of the Secretary Save as Jurisdiction is Granted by Section 205(g) of the Act

In fiscal year 1975, more than 7,600,000 application claims were made under programs created by the Social Security Act; more than 120,000 hearing requests were processed and there were 5,052 new filings in the courts. Social Security Administration, *The Year in Review—The Administration of Social Security Programs 1975* 54, 78, 79 (February 1976). Volume has climbed steeply in the last few years, as is vividly shown by looking back only to 1973 to the figures cited in *Stuckey* v. *Weinberger*, 488 F.2d 904 (C.A. 9) (*en banc*), to evidence "the vast number of claims processed annually by the SSA" (488 F.2d at 910, n. 13):

> In fiscal 1971, the SSA received 5,062,932 applications for benefits; 45,697 appeal hearings were held; and more than 1,600 petitions for review were filed in the United States District Courts. * * *

The administrative procedures specified in Section 205 of the Act provide multiple safeguards intended to ensure that claimants for benefits receive a high

level of protection. Each claimant is entitled to have his claim reviewed three and possibly four times in the administrative process. See pp. 3-4, *supra*; see also *Stuckey* v. *Weinberger*, *supra*, 488 F.2d at 910. If a claim is rejected finally for substantive reasons, the disappointed claimant may take his case to the courts by proceeding in a timely fashion, subject to the rules Section 205 of the Act prescribes as to the scope and standards of review.

Thus, the plan of the statute is clear and salutary. As the statistics show, applications for benefits are in almost all cases settled in the course of routine administration. If issues arise requiring additional attention, they ordinarily are disposed of through the Social Security Administration's internal processes for receiving, considering, hearing, appealing, and determining claims. Judicial review is the exception, not the rule, in these cases. Section 205(h) immunizes the Secretary's decisions from judicial review other than as explicitly provided for in the Act by stating, in its second and third sentences:

> No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

Section 205(g), in turn, provides for review of the Secretary's decisions in only a defined category of cases.

That the preclusive language in Section 205(h) was intended to foreclose any review by courts "except as herein provided," *i.e.*, except as provided by Section 205(g), is not in doubt. *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 764.

The clear meaning of the second sentence of Section 205(h) is to bar judicial review of decisions by the Secretary save for those that can be reviewed under Section 205(g). As we develop more fully below (pp. 16-23), *infra*), a decision as to reopening is not one that comes within the latter section: the court of appeals conceded that nothing in the Act "expressly" authorizes review of such decisions (Pet. App. A, p. 5a), and we will demonstrate that nothing in the Act—or outside of it—impliedly authorizes such review. Beyond that, and more immediately, the third sentence of Section 205(h) specifically precludes the courts from exercising jurisdiction originating outside the Social Security Act to review any action by the Secretary on a Social Security claim.

The court below incorrectly concluded that the preclusive effect of the third sentence of Section 205(h) is limited solely to the invoking of federal-question jurisdiction under 28 U.S.C. 1331 and does not bar the exercise of asserted jurisdiction under the Administrative Procedure Act, 5 U.S.C. 701-706. Apparently underlying that view is the theory that since Section 205(h) was enacted in 1939 and in terms bars only actions brought under former "section 41 of Title 28," it does not apply to the APA, which was enacted in 1946 and was not comprehended in 28 U.S.C. (1946 ed.) 41. The argument,

in short, is that jurisdictional statutes that became law after Section 205(h) and were not enacted as amendments to former 28 U.S.C. (1946 ed.) 41, escape the impact of the final sentence of Section 205(h) and confer jurisdiction over Social Security claims.

In *Weinberger* v. *Salfi*, *supra*, this Court at least inferentially rejected the argument that the preclusive effect of Section 205(h) should be limited in that manner. In that case a widow and stepchild were denied insurance benefits on the basis of the duration-of-relationship requirements of the Act, the marriage having occurred less than nine months before the wage-earner's death. They filed a class action for declaratory and injunctive relief in which they attacked the nine-month requirement as unconstitutional, predicating jurisdiction on 28 U.S.C. 1331 (former 28 U.S.C. (1946 ed.) 41) and also on the mandamus statute and the Administrative Procedure Act. See *Weinberger* v. *Salfi*, No. 74-214, Appendix p. 7. Since the unnamed members of the class had failed to satisfy the jurisdictional requirements of Section 205(g), this Court held that the district court lacked jurisdiction over the claims, observing that "[o]ther sources of jurisdiction [are] foreclosed by [Section 205(h)]" (422 U.S. at 764).[2]

---

[2] In 1966 the Second Circuit had concluded that the provisions of Section 205(h), precluding review of the Secretary's decisions save as permitted in Section 205(g), did not bar review of decisions refusing to reopen a claim. *Cappadora* v. *Celebrezze*, 356 F. 2d 1. To reach that conclusion the court gave Section 205(h) only the limited effect of confining review of a "final decision * * * made after a hearing" to the means

The *Salfi* decision advances the evident congressional objective of freeing the courts from the enormous burden that would fall upon them if, at stages of the administrative process other than specified in Section 205(g), disappointed claimants were free to initiate suits to overturn adverse agency actions. This objective is apparent on a close reading of Section 205 (h). By virtue of the second sentence of that provision, the claimant desiring to attack any "findings of fact or decision of the Secretary" is remitted to the exclusive review process "herein provided," *i.e.*, by Section 205(g). The third sentence deals comprehensively with all actions involving claims under Title II of the Social Security Act, whether or not adjudication of those claims would entail review of

---

prescribed in Section 205(g), and construed it as not precluding or restricting review of an agency action that did not fit the description of a "final decision made after a hearing". *Id.* at 5. This Court's decision in *Salfi* rejected the *Cappadora* interpretation of those sections. It explicitly stated that the provisions of Section 205(h) "prevent review of decisions of the Secretary save as provided in the Act, which provision is made in" Section 205(g). 422 U.S. at 757.

This Court's construction in *Salfi* is the only sound one. It avoids the anomaly created by the construction in *Cappadora* —*i.e.*, that decisions disposing finally of the substantive merits of a Social Security claim must comply with restrictive conditions of access to judicial review under the Act, while interlocutory, insubstantial, or repetitive applications enjoy unrestricted access as far as the Act is concerned. Congress could not have intended so perverse a scheme, as this Court recognized in the passage quoted above from *Salfi*. The Second Circuit now apparently acknowledges that the *Cappadora* construction is inconsistent with *Salfi*. See *South Windsor Convalescent Home, Inc.* v. *Mathews*, C.A. 2, No. 75-6136, decided July 27, 1976.

findings of fact or a decision by the Secretary. Since at the time the Act became law former 28 U.S.C. (1946 ed.) 41 was the encompasing provision granting federal-question jurisdiction and embraced every permissible type of suit that might arise under the Social Security program, the purpose of the two sentences is unmistakable.[3] Congress intended to preclude suits based on Social Security claims, save for the special channel it carved out for review of decisions meeting the requirements of Section 205(h). Neither the Administrative Procedure Act in 1946 nor any other later-enacted statute should be construed as an implied nullification of the careful congressional plan. Moreover, since 1946 Congress has confirmed its faith in the vitality of that plan by incorporating Section 205(h) by reference in other programs under the Social Security Act: in Title XVIII (Medicare), 42 U.S.C. 1395ii, in Title XVI (Supplemental Security Income), 42 U.S.C. (Supp. V) 1383(c)(3); and see, also Title IV (Black Lung Benefits), Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. (Supp. V) 923(b). Those incorporations of Section 205(h) would have no purpose if medicare and the other designated benefit claims were to be allowed unconfined judicial access and review

---

[3] In *Salfi*, this Court said (422 U.S. at 756, n. 3): "The literal wording of [Section 205(h)] bars actions under 28 U.S.C. § 41. At the time [Section 205(h)] was enacted, and prior to the 1948 recodification of Title 28, § 41 contained all of that title's grants of jurisdiction to United States district courts, save for several special-purpose jurisdictional grants of no relevance to the constitutionality of Social Security statutes."

going outside the route specified by the Social Security Act.

In the absence of any statutory language expressly modifying the plan of agency-court relations prescribed so deliberately in the Social Security Act, the argument of implied change in the jurisdictional balance should be rejected.[4] The plain and obvious meaning of Section 205(h) is that a decision of the Secretary is reviewable, if at all, only under Section 205(g).

B. Section 205(g) Does Not Authorize Judicial Review of the Secretary's Decisions on Reopening Claims.

The court of appeals acknowledged that review was not authorized here by Section 205(g) (Pet. App. A, p. 5a). That conclusion reflects the apparently unbroken line of cases[5] on the question of reviewability under that statute of decisions as to reopening. See, *e.g.*, *Maddox* v. *Richardson*, 464 F.2d 617, 621 (C.A. 6); *Stuckey* v. *Weinberger*, *supra*, 488 F.2d at 909; *Cappadora* v. *Celebrezze*, *supra*, 356 F.2d at 4-5 (C.A. 2); *Davis* v. *Richardson*, 460 F.2d 772, 775 (C.A. 3); *Ortego* v. *Weinberger*, 516 F.2d 1005, 1007-1008 (C.A. 5); *Neighbors* v. *Secretary of Health, Education and Welfare*, 511 F.2d 80, 81 (C.A.

[4] Nothing in the legislative history of the Administrative Procedure Act suggests a congressional intention to revamp completely the scheme for review of Social Security cases.

[5] *Ortego* v. *Weinberger*, 516 F. 2d 1005, 1007 (C.A. 5): "All courts agree that the Social Security Act does not, by its terms, provide for judicial review of refusals to reopen."

10). It also reflects the plain meaning of the statute in accordance with this Court's decision in *Salfi*.

Entitled "Judicial review," Section 205(g) reads in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. * * *

The requirements for judicial review that emerge from that sentence and related provisions of Section 205(g) were set out clearly in *Salfi* (422 U.S. at 763-764):

> * * * (1) a final decision of the Secretary made after a hearing; (2) commencement of a civil action within 60 days after the mailing of notice of such decision (or within such further time as the Secretary may allow); and (3) filing of the action in an appropriate district court, in general that of the plaintiff's residence or principal place of business. * * *

Respondent's claim does not qualify under those standards, for as this Court said in *Salfi*, it is "central to the requisite grant of subject-matter jurisdiction" under the statute that the Secretary's decision be of a particular type—"that type being [one that is] 'final' and 'made after a hearing'" (422 U.S. at 764).

The Secretary's refusal to reopen a previously ad-

judicated claim satisfies neither requisite. Manifestly such a refusal is not "made after a hearing" within the meaning of the statute.[6] In using that language, Congress evidently intended to reserve judicial review for administrative actions that disposed of claims with respect to which the claimant had been afforded a right to a prior hearing. See Section 205(b). See also, *e.g.*, *Cappadora* v. *Celebrezze*, *supra*, 356 F. 2d at 4; *Ortego* v. *Weinberger*, *supra*, 516 F. 2d at 1007; *Filice* v. *Celebrezze*, 319 F. 2d 443, 445-446 (C.A. 9). But there is no entitlement to a hearing on a request to reopen a previously adjudicated claim; determinations of such requests are properly made without a hearing and not "after a hearing."

Furthermore, the Secretary's determination against reopening a claim is not a "final decision" within the meaning of Section 205(g). That phrase, incorporating as it does a requirement of exhaustion of administrative remedies, necessarily refers to the final disposition of a claim for benefits on its merits. That "final decision" in this case was made years before this action was brought. As the Appeals Council ruled on April 5, 1974, in refusing to reopen respondent's application, "the determination dated February 24, 1966, stands as the final determination of this De-

[6] Moreover, although in this case there had been a hearing upon respondent's earlier application for benefits, many if not most reopening cases will involve efforts to reopen applications that have not progressed to the hearing stage. In those situations the Secretary's decision whether to reopen will not be made, even in the barest temporal sense, "after" any hearing.

partment" (App. 37). This Court noted in *Salfi* (422 U.S. at 766) that "[t]he term 'final decision' is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation." The Secretary has done so by providing that the final decision denying a claim for benefits stands as the "final decision" unless and until the application is reopened. 20 C.F.R. 404.951. That provision is manifestly reasonable.

In short, under Section 205(g), respondent was required to bring suit for review within 60 days of that 1966 decision or not at all. A "final decision" was rendered on respondent's claim, and the time for seeking review passed, long before his action was instituted in district court. It would largely defeat the congressional goal of administrative finality, and burden the courts with repetitive efforts to revive stale claims, to construe the phrase "final decision" as encompassing all post-adjudication refusals by the Secretary to reopen closed matters.

Our reading of Section 205(g) finds substantial support by analogy to *Securities and Exchange Commission* v. *Louisiana Public Service Commission*, 353 U.S. 368. The question there was whether a Commission order denying a petition to reopen was subject to judicial review. The issue arose under a provision of the Public Utility Holding Company Act of 1935, 49 Stat. 820, 15 U.S.C. 79k(b), which provided:

> * * * Any order made under this subsection shall be subject to judicial review as provided in section 79x of this title.

In turn, Section 79x provided for review in the court of appeals within 60 days after issuance by the Commission of its order. This Court held that the court of appeals lacked jurisdiction to review the refusal to reopen, observing (353 U.S. at 371-372) that judicial review was limited to orders of the Commission that were "directory" or that revoked or modified directory orders, and that "the quoted language does not include an order merely denying a petition to reopen * * * proceedings."

Similar analysis here compels the conclusion that Section 205(g) grants the district courts jurisdiction to review only substantive determinations denying benefits and not subsequent refusals to reconsider such determinations. Indeed, this is an *a fortiori* case, for Section 205(g) does not grant judicial review of "any order," but only of "any final decision * * * made after a hearing," language that manifestly encompasses a narrower class of agency decisions. At a minimum, therefore, Section 205(g) should be read to bar review of the kind of post-adjudication determination involved here and in *Louisiana Public Service Commission.*

This Court's decision in *Mathews* v. *Eldridge*, 424 U.S. 319, is not to the contrary. In that case, this Court upheld the district court's jurisdiction to entertain a suit to enjoin the Secretary from terminating the plaintiff's Social Security disability benefits without a prior hearing. Since the Secretary's decision to terminate benefits, by the very nature of the case, had not been made "after a hearing," the

Secretary argued that the requirements of Section 205(g) had not been met, that review could be sought only after exhausting post-termination administration procedures. In rejecting that argument, this Court in effect held that insofar as the principal purpose of Section 205(g) is to impose an explicit requirement of exhaustion of administrative remedies, it should be construed as incorporating the exception to the nonstatutory doctrine of exhaustion that a claimant need not exhaust procedures if as a result of doing so he must incur the very injury that his suit was intended to obviate. See, *e.g.*, *Utah Fuel Co.* v. *National Bituminous Coal Commission*, 306 U.S. 56. Cf. *Arnett* v. *Kennedy*, 416 U.S. 134. As the Court noted in *Eldridge* (424 U.S. at 331):

> A claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a post-deprivation hearing. * * * In light of the Court's prior decisions,* * * Eldridge has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments.[7]

---

[7] Similarly, this Court's acceptance of the Secretary's waiver of the requirement of finality as to the named plaintiffs in *Salfi* presumably reflected recognition of another exception to the nonstatutory doctrine of exhaustion, that administrative procedures need not be exhausted when the plaintiff's sole con-

Such considerations are not relevant here. There is no question in this case concerning the comprehensiveness of Section 205(g)'s exhaustion requirement. The question, rather, is whether a claimant who, having exhausted the administrative procedures and then having failed to seek review in a timely manner, may reactivate Section 205(g) jurisdiction by requesting the administrator to reconsider his claim. A sensible policy of judicial review, as well as the statutory language, requires that a negative answer be made to this question. The decision whether to reopen stale claims is one that may appropriately be left to nonreviewable administrative resolution. The questions considered in making such decisions, such as whether new and material evidence has been presented, or whether there is error on the face of the record, unlike the questions presented in *Salfi* and *Eldridge*, for example, are not of constitutional magnitude. The interests of the claimants who have no statutory entitlement to reopening and have passed up judicial review of the merits of their claims, are outweighed by society's interests in a rational allocation of scarce judicial resources.

The language of Section 205(g) affords no basis for the assertion of jurisdiction to review reopening decisions. The broad jurisdictional bar of the third sentence of Section 205(h)—"[n]o action * * * shall

---

tention is that the statute administered is unconstitutional. See, *e.g.*, *Public Utilities Commission* v. *United States*, 355 U.S. 534. See generally 3 Davis, *Administrative Law Treatise* § 20.04 (Supp. 1970).

be brought * * * to recover on any claim"—when read together with the unavailability to respondent of review under Section 205(g), meets the requirement that there be demonstrated "a congressional meaning to prohibit judicial review [of respondent's claim]." *Dunlop* v. *Bachowski*, 421 U.S. 560, 567. Accordingly, even if jurisdiction is otherwise conferred by the Administrative Procedure Act—a conclusion we dispute below (pp. 23-41, *infra*)—such jurisdiction was foreclosed here because "statutes preclude judicial review." 5 U.S.C. 701(a)(1). See *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 764.

II

THE ADMINISTRATIVE PROCEDURE ACT DOES NOT CONFER JURISDICTION ON THE FEDERAL COURTS TO REVIEW THE SECRETARY'S DECISION

We have argued above that respondent's suit is precluded by the Social Security Act since it fails to satisfy the Act's prerequisites for seeking judicial review. If the Court agrees with that submission, it need not consider the further question whether jurisdiction to hear respondent's suit otherwise is granted by the Administrative Procedure Act, 5 U.S.C. 701-706. We discuss that question here, submitting that such jurisdiction is not affirmatively authorized and that it cannot be implied.

1. The Court below incorrectly held that the APA confers independent jurisdiction on the federal district courts to review agency action. That holding misconceives the language, history, and very purpose

of the APA. It mistakes provisions that regulate the particular procedures, forms, and standards for judicial review of claims of legal injury for provisions that grant jurisdiction to hear and decide whole classes of lawsuits. It transforms language prescribing what judges may do in actions properly before them into authorization to bring these actions into their courtrooms. If that view of its impact were accepted, the APA would sweep in a vast jurisdiction over administrative agencies and government officials, unrestricted by the limitations contained in either the general jurisdiction grants in Title 28 [8] or the special statutes covering particular agencies.

This far-reaching authority was ascribed by the court of appeals to the provisions of the APA codified at 5 U.S.C. 701-706. These provisions, collectively designated as Section 10 of the APA, comprise the "judicial review" portion of the statute. The judicial review part of the statute was only one of twelve sections of the enactment, and was by no means the most renowned part of it. The APA was enacted with the ambitious aim of thoroughly reforming administrative agency operations. The reforms were intended to afford persons affected by administrative action the means of knowing their rights and the procedures for protecting them. S. Doc. No. 248, 79th Cong., 2d Sess. 304 (1946). From the

[8] Among these are 28 U.S.C. 1331 (federal questions); 1333 (admiralty claims); and 1337 (interstate commerce). The amount-in-controversy requirement is the most important limitation on jurisdiction under Section 1331.

agencies' standpoint, the APA was a charter of essential principles regulating how they were to function. The Act required them to issue information about their organization and procedures; delineated the essentials of various forms of administrative proceedings and the limitations on administrative powers; laid down requirements for administrative hearings and decisions; and also contained rules on how judicial review was to be conducted and made effective. Although important, the provisions covering judicial review were not intended to bring about the kind of dramatic change in the jurisdiction of the courts to oversee the agencies that the decision of the court of appeals necessarily implies.

The language of Section 10 plainly shows that its thrust is procedural and remedial, not jurisdictional. A brief preliminary overview of its coverage demonstrates this. It begins by excluding from its judicial review provisions any challenged agency actions that other statutes preclude from judicial review, and any actions that are by law committed to agency discretion. Thus, in its opening provision Section 10 shows its singular concern for the problem of which types of agency action will be subject to its judicial review provisions; it reflects no interest in the jurisdiction of federal courts. The remaining provisions of Section 10 amplify its concern with review procedures and remedies.

A person suffering legal wrong from agency action is declared to be entitled to judicial review. The

form of the proceeding is to be that specially provided by statute or, in the absence of such provision, an appropriate common-law proceeding. The kinds of agency actions that are reviewable are described. Provision is made for the reviewing court to preserve the status of matters before it, pending conclusion of the review proceedings. Finally, an enumeration is provided of the types of determinations a reviewing court may render.

Although courts purporting to construe the APA have not undertaken a section-by-section analysis of its text, such an analysis is necessary.

As we have indicated, Section 701 of Title 5 of the United States Code is concerned with the applicability of the succeeding provisions of the APA:

> (a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law.

We demonstrated above (pp. 22-23, *supra*) that subparagraph (a)(1) is effective here because the Social Security Act "preclude[s] judicial review." Subsection (a)(2) similarly applies: since Congress chose not to create a statutory entitlement to reopening, and instead left the decision whether to reopen a previously adjudicated application entirely to the Secretary's discretion, that decision in nonreviewable under the APA as "agency action * * * committed to agency discretion by law." As the Ninth Circuit

stated in *Stuckey* v. *Weinberger*, *supra*, 488 F. 2d at 910:

> * * * [T]he Congress intended * * * to commit irrevocably to agency discretion those decisions which are rendered after full and fair agency hearings * * *. Thus committed, these decisions are beyond the jurisdiction of the courts under both the [Social Security] Act and the APA.

See also *Ortego* v. *Weinberger*, *supra*, 516 F. 2d at 1011.

But even if the judicial review provisions of the APA were deemed applicable on some theory that Section 701 does not foreclose applicability of Sections 702-706 to this case, analysis of the text, history, and purpose of those provisions should lead this Court to reject the court of appeals' view that they themselves grant the federal courts jurisdiction by implication. Section 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

Section 702 does not address the question of the competence or jurisdiction of federal courts to entertain complaints regarding agency action. Its focus is on making known which categories of persons are entitled to judicial review in courts that possess jurisdiction by virtue of grants of authority elsewhere

conferred. A person seeking review must point to such a grant of authority in order to establish that the court is empowered to hear claims of legal injury through agency action. When that is done and entitlement shown, the right of review comes into being and will be vindicated by procedures and remedies set forth in Section 702. Nothing in its language can be stretched to imply an independent grant of jurisdiction over an undefined range of grievances.[9]

Section 703 makes the sole use of the word "jurisdiction" discoverable in any material APA provision. In pertinent part it states:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter *in a court specified by statute* or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, *in a court of competent jurisdiction.* [Emphasis supplied.]

The insistence that the proceedings must be brought "in a court specified by statute" or "in a court of competent jurisdiction" conveys the strong implication that the APA does not itself vest jurisdiction in federal courts.[10] Both clauses look to outside sources

[9] See Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 3568, pp. 466-467 (1975): "This language * * * says nothing that fairly can be read as a grant of jurisdiction."

[10] See Wright, Miller & Cooper, *supra*, at 467: "The limitation to a court of 'competent jurisdiction' makes no sense if the statute itself is a grant of jurisdiction."

of authority and presuppose that the court of appropriate jurisdiction has been identified and invested with power by a provision of law that appears elsewhere in the books.[11] If the APA had intended to confer jurisdiction, it would have identified the courts that were to be competent. The absence of jurisdictional language cannot be explained away as unconcern for technical language. Where Congress has intended to confer jurisdiction, it has chosen language that made that intention plain. Section 205 (g) of the Social Security Act, for example, specifies that a claimant may obtain judicial review of a final decision of the Secretary by bringing an action "in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or * * * in the United States District Court for the District of Columbia." The contrast between that formulation and the langauge of the APA is stark. Whereas in Section 205 (g) the claimant is directed to particular courts that are specifically empowered to entertain his suit, the APA merely remits a claimant to "a court of competent jurisdiction," if any. Congress thus manifested its purpose to leave court jurisdiction in this area unchanged.

[11] Cf. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389, 417-418 (1970). Professor Jaffe has said of Section 703 that it appears "to do no more than incorporate by reference existing jurisdiction." Jaffe, *Judicial Control of Administrative Action* 164 (1965).

The same observation applies to Section 704, which in pertinent part reads:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.

Section 704 was included to make clear the kinds of agency actions that were to be judicially reviewable under the APA's processes. As throughout, the emphasis was on the matter of review, not jurisdiction. Actions "directly" reviewable consisted of those specifically made so by statute—whether final or not —and also final actions for which no court remedy other than judicial review would be adequate (subject, of course, to existence of a jurisdictional basis). Actions "not directly reviewable," the second sentence of Section 704 makes clear, were to be any agency orders or rulings of a preliminary, procedural or intermediate nature. These were to be obliged to await final agency action. They then would become reviewable upon the review of the final action. The legislative history fully bears out this reading: the Senate Committee Report declares that Section 704, in "defining reviewable acts, is designed also to negative any intention to make reviewable merely preliminary or procedural orders where there is a subsequent and adequate remedy at law available * * *." S.Doc. No. 248, 79th Cong., 2d Sess. 37 (1946). It

follows, as a matter of both language and history, that Section 704 cannot correctly be construed as conferring jurisdiction.

Sections 705 (dealing with relief pending review) and 706 (defining the scope of review when a court engages in reviewing agency action) are not relevant to the issues presented.

2. The legislative history of the APA reinforces the teaching of its text that the congressional intent was to clarify procedural standards for court review of administrative action, not to create a new basis of jurisdiction. When Congress enacted the APA in 1946, the federal jurisdictional statute of general scope was 28 U.S.C. (1946 ed.) 41, later codified as Section 1331, providing in part:

> The district courts shall have original jurisdiction of all civil actions wherein the amount in controversy exceeds the sum or value of $3,000, exclusive of interests and costs, and arises under the Constitution, laws, or treaties of the United States.

The difficulty of meeting the amount-in-controversy requirement of that statute has been the major obstacle to using it as the basis of jurisdiction in suits to review the legality of actions of federal officers. That situation obtained also in 1946. Persistent criticism of the requirement recently has eventuated in passage by the Senate of S.800, 94th Cong., 2d Sess. (1976), which would end the prerequisite of a dollar-measured amount in controversy in suits based on asserted unlawful action by federal officials.

The Federal Declaratory Judgment Act, 28 U.S.C. (1946 ed.) 400, later codified as Sections 2201, 2202, was also in force in 1946. In pertinent part it provided:

> In a case of actual controversy *within its jurisdiction* * * * any court of the United States * * * may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought * * *. (Emphasis supplied.)

The Declaratory Judgment Act was not construed as an independent grant of jurisdiction to review agency action.[12] To bring a case "within its jurisdiction" a court would have to find authority to do so in some source external to that Act.[13]

In context, if the APA in 1946 had broadened the competence of the federal courts by permitting judicial review of any claim of legal wrong in consequence of agency action, it would have been effecting a momentous expansion of federal jurisdiction. The proposal would have set off a vigorous debate that would have been reported thoroughly. In fact, contemporaneous legislative documents show nothing of the sort. The absence of discussion of the issue of jurisdictional enlargement is highly indicative that

---

[12] See, *e.g.*, *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667; Wright, Miller & Cooper, *Federal Practice and Procedure* § 2766 (1973).

[13] A comparable reference appears in Section 703 of the APA, requiring that a permitted form of proceeding be brought "in a court of competent jurisdiction." See p. 28, *supra*.

the APA was not intended to have the effect of granting wide-ranging jurisdiction over agency actions.

In response to a request by Congress for comments prior to passage of the APA, the Attorney General described it as "legislation * * * designed to deal horizontally with the subject of administrative procedure." S. Doc. No. 248, *supra*, at 223, 406. He rejected the idea "that there is anything inherent in the subject of administrative procedure * * * which defies workable codification." *Id.* at 224, 407. With specific regard to Section 10 he stated that "this section, in general, declares the existing law concerning judicial review." S. Doc. No. 248, *supra*, at 229. In particular, the Attorney General stated that Section 10(c) (now 5 U.S.C. 704), regarding actions reviewable, "is intended to state existing law." S.Doc. No. 248, *supra*, at 230. Because of the substantial role the Department of Justice played in aiding Congress' consideration of the APA, particular significance attaches to a Department memorandum apparently also furnished by the Attorney General (*id.* at 415):

> Section 10 as to judicial review does not * * * make any real changes in existing law. * * * It is an attempt to restate in exact statutory language the doctrine of judicial review as expounded in various statutes and as interpreted by the Supreme Court. I know that some agencies are quite concerned * * * that it will change existing doctrine of judicial review which has been settled for the particular agency * * *. I

> feel sure that should this section be given the interpretation which is intended, namely, that it is merely a restatement of existing law, there would be no difficulty for any agency.

Those reassurances were consistent with the purposes of the bill to provide for public information, administrative operation, and judicial review. *Id.* at 304.

3. A number of circuits have held in diverse contexts that the APA of its own force grants jurisdiction to review agency action.[14] As many other circuits have held the opposite.[15] The commentators are also divided on the issue.[16]

---

[14] See, *e.g.*, *Elton Orchards, Inc.* v. *Brennan*, 508 F.2d 493 (C.A. 1); *McEachern* v. *United States*, 321 F.2d 31 (C.A. 4); *Ortego* v. *Weinberger*, *supra*; *Bard* v. *Seamans*, 507 F.2d 765 (C.A. 10); *Pickus* v. *United States Board of Parole*, 507 F.2d 1107 (C.A. D.C.).

[15] See, *e.g.*, *Grant* v. *Hogan*, 505 F. 2d 1220 (C.A. 3); *Bramblett* v. *Desobry*, 490 F. 2d 405 (C.A. 6), certiorari denied, 419 U.S. 872; *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F. 2d 529 (C.A. 8); *Nguyen da Yen* v. *Kissinger*, 528 F. 2d 1194 (C.A. 9). The Second Circuit appears to consider the question still open. *South Windsor Convalescent Home, Inc.* v. *Mathews*, C.A. 2, No. 75-6136, decided July 27, 1976. And some circuits have decided the question both ways. Compare, *e.g.*, *Davis* v. *Richardson*, 460 F.2d 772 (C.A. 3), with *Grant* v. *Hogan*, 505 F. 2d 1220 (C.A. 3); *Bramblett* v. *Desobry*, *supra*, with *Hunt* v. *Weinberger*, 527 F. 2d 544 (C.A. 6).

[16] Compare Byse & Fiocca, *Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action*, 81 Harv. L. Rev. 308 (1967), Davis, *Administrative Law Treatise* § 23.02 (Supp. 1976), and Jaffe, *Judicial Control of Administrative Action* 165 (1965) with Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389, 445 (1970), Wright, Miller & Cooper, *Federal Practice and Procedure* § 3568 (1975), Comment, *The Jurisdictional Basis of Nonstatutory Judicial Review in Suits Against Federal Officers—Jurisdictional Amount, the Administrative Procedure Act and Mandamus*, 51 Wash. L. Rev. 97, 114-115 (1975), and Project, *Federal Administrative Law Developments—1971*, 1972 Duke L.J. 115.

Some who find an affirmative grant of jurisdiction in the APA rely in part on this Court's decisions in *Rusk* v. *Cort*, 369 U.S. 367, *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, and *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402. Those decisions did not decide this question.

In *Rusk* v. *Cort*, an action was brought for declaratory and injunctive relief, challenging the determination of the Secretary of State that the plaintiff had lost his citizenship under Section 349(a)(10) of the Immigration and Nationality Act of 1952 by remaining outside the United States for the purpose of avoiding military service. The district court denied the Secretary's motion to dismiss, which was based upon the claim that Section 360(b) and (c) of that Act prescribed the exclusive procedure for obtaining judicial relief (an action for habeas corpus against the Attorney General upon reentry), and held Section 349(a)(10) unconstitutional. This Court affirmed the denial of the motion to dismiss, concluding that the review procedure prescribed by Section 360(b) and (c) was not exclusive and that the Secretary's determination was therefore subject to review under

"the broadly remedial provisions of the Administrative Procedure Act" (369 U.S. at 379-380). Although the Court at one point couched the question presented in terms of jurisdiction (369 U.S. at 370), it is clear that jurisdiction as such had been conferred by 28 U.S.C. 1331: plaintiff alleged a deprivation of his basic right of citizenship, and it has long been understood that such an allegation satisfies the statute's amount-in-controversy requirement. See *Wiley* v. *Sinkler*, 179 U.S. 58. The question actually decided by the Court in *Cort* concerned reviewability, not jurisdiction. The essence of the Secretary's argument was that his determination was not subject to direct judicial review, that no cause of action arose until plaintiff was detained by the Attorney General upon reentry. In rejecting that argument, the Court stated (369 U.S. at 372):

> On their face the provisions of [the Declaratory Judgment Act and the Administrative Procedure Act] appear clearly to permit an action * * * to review the final administrative determination of the Secretary of State. This view is confirmed by our decisions establishing that an action for declaratory judgment is available as a remedy to secure a determination of citizenship—decisions rendered both before and after the enactment of the Administrative Procedure Act.

The passage clarifies that the Court was rejecting a defense of nonreviewability, not one of lack of jurisdiction. If the issue had been whether the APA confers jurisdiction, neither decisions prior to its enactment nor the nonjurisdictional Declaratory Judgment Act would have been relevant. By referring to such decisions, it is clear that the Court was invoking the pre-existing common law doctrine of the reviewability of administrative actions that was codified in the APA and was not deciding the question of jurisdiction presented here.[17]

Similarly, *Abbott Laboratories* v. *Gardner* and *Citizens to Preserve Overton Park* v. *Volpe* concerned questions of reviewability, not of statutory jurisdiction. In *Abbott Laboratories*, the issue was whether pre-enforcement judicial review of a particular class of regulations issued by the administrator was implicitly precluded by the Federal Food, Drug, and Cosmetics Act's provision for such review of a different class of regulations. In holding that it was not, the Court noted (387 U.S. at 142; footnotes omitted):

> At the time the Food, Drug, and Cosmetic Act was under consideration, in the late 1930's, the Administrative Procedure Act had not yet been enacted, the Declaratory Judgment Act was in its infancy, and the scope of judicial review of administrative decisions under the equity power was unclear. It was these factors that led to the form the statute ultimately took. There

[17] Accordingly, we disagree with the suggestion that the Court in *Cort* decided the question of APA jurisdiction "inadvertently and without focus on the problem." Davis, *Administrative Law Treatise* § 23.02 (Supp. 1976). But even if the Court had assumed the existence of APA jurisdiction in that matter, the issue would remain open for decision in a case in which it is squarely presented, with full briefing and oral argument. Cf. *Edelman* v. *Jordan*, 415 U.S. 651, 670-671; *Gonzalez* v. *Employees Credit Union*, 419 U.S. 90, 95.

> is no evidence at all that members of Congress meant to preclude traditional avenues of judicial relief. Indeed, throughout the consideration of the various bills submitted to deal with this issue, it was recognized that "There is always an appropriate remedy in equity in cases where an administrative officer has exceeded his authority and there is no adequate remedy of law, * * * [and that] protection is given by the so-called Declaratory Judgments Act * * *." H.R. Rep. No. 2755, 74th Cong., 2d Sess., 8.

Since Congress was of the view that the administrator's decisions generally would be reviewable, and since in prescribing a particular form of review for some decisions Congress had not explicitly precluded review of others, those other decisions continued to be subject to review after the enactment of the APA as they had been before. Having so concluded, the Court was not required to discuss the separate question of statutory jurisdiction in view of the nature of the case, which involved commercial interests that could be assumed to have a value substantially in excess of the amount-in-controversy requirement of 28 U.S.C. 1331.

In *Citizens to Preserve Overton Park* the "threshold question" was stated explicitly in terms of reviewability, not of statutory jurisdiction (401 U.S. at 410). Once again, the interest at stake substantially exceeded the jurisdictional minimum prescribed by 28 U.S.C. 1331, so that reliance upon the APA was necessary only to prove a right to judicial review, not to establish subject-matter jurisdiction.

These decisions recognize and implement a presumption favoring judicial review. But a presumption favoring judicial review cannot be transformed into a presumption in favor of jurisdiction—to say nothing of a *per se* grant of jurisdiction. And here, unlike *Rusk*, *Abbott Laboratories*, and *Overton Park*, jurisdiction under 28 U.S.C. 1331 is plainly unavailable, because of the explicit bar of the third sentence of Section 205(h) of the Social Security Act. The actual teaching of *Rusk*, *Abbott Laboratories*, and *Overton Park* is that congressional silence in an agency-creating statute as to how to enter the courts to challenge the agency's actions is not conclusive evidence of an intent to withhold all judicial oversight. In the three cases the plaintiffs raised issues of law. These issues were of types particularly well suited to judicial determination. They did not present any narrow, highly fact-filled issue calling for discretionary choice, such as the issue of reopening a previously denied claim for disability benefits. Moreover, the underlying statutes in those cases did not furnish a fair and comprehensive procedure for obtaining court review of the substance of the claim. Here, the Social Security Act did precisely that, and it was only the claimant's prior choice to forego the adjudication that was his for the asking that gives rise to the problem.

Focusing upon the jurisdictional issue in a case of this kind, Section 10 of the APA can be seen for what it is and what it is not:

> The better reasoned view, followed by most of the circuit courts which have considered the problem, is that section 10 does *not* confer jurisdiction. It increases access to judicial review by widening the definition of reviewable actions, but does so only for already jurisdictionally empowered courts * * *. This view is supported by the absence of any reference to statutory jurisdiction in the legislative history of the APA and, as a matter of statutory construction, by the express language of the APA. [Project, *Federal Administrative Law Developments—1971*, *supra*, 1972 Duke L. J. at 230 (emphasis in original; footnotes omitted).]

A difference often overlooked must be kept in view. When a court obeys legislative authorization to review agency action for conformity to the legal rules, it vindicates the legislature's exact purpose. When it exercises jurisdiction to review agency decisions that were committed to other processes, a court may jeopardize the due functioning of the entire administrative program. Here, a coherent plan for testing the correctness of the agency's decision on the heart of the claim was written into the underlying substantive statute. Provision was made for entry into the federal courts, both as to manner and time. Superimposing a different and delayed path of court entry upon the statutory plan—a path that the claimant could retrace repeatedly at will—would threaten serious disruption of the due administration of the Social Security Act. Cf. *Brown* v. *General Services Administration*, No. 74-768, decided June 1, 1976. "At some point the benefit of an additional safeguard

to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost." *Mathews* v. *Eldridge*, *supra*, 424 U.S. at 348. That point would be passed if the federal courts were charged with unqualified jurisdiction to review the Secretary's refusals to reopen stale Social Security claims.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

REX E. LEE,
Assistant Attorney General.

KEITH A. JONES,
Deputy Solicitor General.

MAURICE ROSENBERG,
Special Assistant to the Attorney General.

ROBERT E. KOPP,
JOHN M. ROGERS,
Attorneys.

SEPTEMBER 1976.

APPENDIX

1. Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in part:

> Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Secretary, with or without remanding the cause for a rehearing. The findings of the Secretary as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Secretary or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Secretary, because of failure of the claimant or such

individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations. * * *

2. Section 205(h) of the Social Security Act, 42 U.S.C. 405(h), provides:

> The findings and decisions of the Secretary after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Secretary shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Secretary, or any officer or employee thereof shall be brought under section 41 of Title 28 to recover on any claim arising under this subchapter.

3. The Administrative Procedure Act, 5 U.S.C. 701(a), provides:

> This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
> (2) agency action is committed to agency discretion by law.

4. The Administrative Procedure Act, 5 U.S.C. 702 provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

5. The Administrative Procedure Act, 5 U.S.C. 703, provides:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

6. The Administrative Procedure Act, 5 U.S.C. 704, provides in part:

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

7. 20 C.F.R. 404.937 provides in part:

> The Administrative Law Judge may, on his own motion, dismiss a hearing request, either entirely or as to any stated issue, under any of the following circumstances:
>
> (a) *Res judicata.* Where there has been a previous determination or decision by the Secretary with respect to the rights of the same party on the same facts pertinent to the same issue or issues which has become final either by judicial affirmance or, without judicial consideration, upon the claimant's failure timely to request reconsideration, hearing, or review, or to commence a civil action with respect to such determination or decision * * *.

8. 20 C.F.R. 404.957 provides in part:

> An initial, revised, or reconsidered determination of the Administration or a decision or revised decision of a hearing examiner or of the Appeals Council which is otherwise final * * * may be reopened:
>
> (a) Within 12 months from the date of the notice of the initial determination * * * to the party to such determination, or
>
> (b) After such 12-month period, but within 4 years after the date of the notice of the initial determination * * * to the party to such determination, upon a finding of good cause for reopening such determination or decision, or

> (c) At any time when:
>
> * * * * *
>
> (8) Such * * * determination or decision * * * is unfavorable * * * to the party thereto but only for the purpose of correcting clerical error or error on the face of the evidence on which such determination or decision was based.
>
> * * * * *

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 220037 305